

Testimony of
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before the
Committee on Commerce
United States Senate
Hearings on
S.383, the Airline Passenger Fairness Act
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Mr. Chairman and Members of the Committee, Consumers Union¹ appreciates this opportunity to testify on the subject of S.383, the Airline Passenger Fairness Act. We support this bill and commend Senator Wyden, the Chairman and the other co-sponsors for the excellent approach and hard work that it reflects. We also would like to suggest some revisions to the bill that we believe would increase its ability to protect consumers from some of the worst anti-consumer practices of the airline industry.

The Competition Context of Anti-Consumer Practices

The practices addressed by this bill need to be viewed in the context of the industry's overall non-competitive situation. This industry is characterized by individual carrier domination of many routes through the use of hub city slot control, predatory undercutting of smaller, discount fare competitors, "virtual real time auctioning" of tickets, restrictions against customer utilization of cheapest available fares, attempts to squeeze independent travel agents out of the market (hence reducing the informed shopping ability of consumers who cannot use the internet efficiently), and a variety of other practices. Alliances between competitors add to the non-competitive nature of the industry. These alliances facilitate such practices as "code-sharing," which creates additional ways for carriers to avoid price competition².

Some of the practices addressed by S.383 would not happen in a competitive industry. As recently pointed out by Dr. Mark Cooper,³ conduct depends greatly on the degree of competition wrought by structure, and the airline industry is anything but competitive. I would like to submit a copy of Dr. Cooper's speech for the use of the Committee.

While S.383 will address some of the conduct issues in the industry, it will not

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about good, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

² "The Code-Sharing Threat," *Consumer Reports Travel Letter*, November, 1998, pp. 249-250. The Department of Transportation is investigating code-sharing practices as a competition issue. While we do not have legislative recommendations at this point, we believe that it would be fruitful for the Committee to seek reports from DOT and the General Accounting Office on code-sharing practices.

³ "Freeing Public Policy From The Deregulation Debate: The Airline Industry Comes of Age (And Should Be held Accountable for Its Behavior), Dr. Mark Cooper, Director of Research, Consumer Federation of America, presented at the American Bar Association Forum on Air and Space Law: The Year in Aviation, January 22, 1999.

address all, including the hub-domination competitive issue, the stranding of passengers when the hub-dominant carrier has prolonged service interruptions, the limited service to smaller communities, and the overall pricing structures for many routes of service⁴.

Therefore, in addition to enacting a revised version of S.383, the Congress needs to mandate the Department of Transportation to, rather than prohibit it from, establishing and enforcing rules to prevent price predation at hub airports. And it needs to establish as public policy the application of a strong pro-competitive test for the operation of industry “alliances” between actually or potentially competing carriers.

Anti-Consumer Practices

The noncompetitive situation facilitates the anti-consumer practices, which S. 383 addresses. For example, in what competitive situations do we see retailers *hide* their discounts from prospective customers? Unlike the airlines industry, supermarkets, pizza shops and the like hang consumers’ doorknobs and stuff their mailboxes with discount coupons at every opportunity. By contrast, the airline industry maintains discount fares only to fill seats when prospective customers at higher fares will not “buy out the store,” so to speak.

And, the practice addressed by Subsection 3(b)(2) of S.838 could only happen in a noncompetitive industry. Airline “tariffs”⁵ include conditions of carriage that prohibit passengers from buying two tickets on a round trip at less than the price of one and using half of each ticket in each direction. What grocer would sell two loaves of bread for less than the price of one, then ask for the difference back when he discovers that the customer only wanted one loaf, bought two because of the price savings, and threw the other loaf to the birds?

To make matters worse, because of constantly changing prices for the same airplane seats, consumers purchase airline tickets in a market where the amount of fare information is enormous. The information necessary for making informed purchasing decisions about an individual trip is difficult to isolate, obtain and process. An exclusive *Consumer Reports* study prepared for its July, 1997, article on airfares, examined more than 3 million discount airline tickets purchased on 34 of the most heavily traveled domestic city-pair routes in 1996. Based on the study, *Consumer Reports* concluded

⁴ See Cooper, *supra*, Table 5 at p.12, for some examples of the differences in price on comparable competitively- and noncompetitively-served routes.

⁵ These are contained in what the law surely would deem to be contracts of adhesion, in which the consumer has no power to bargain over the contract terms.

that ticket prices for a given class of service between two points can vary by hundreds of dollars depending on the “availability” of a wide range of fares at the time of purchase. “Availability is determined not so much by how many seat miles the carrier can provide on a given flight, but by how many seats it chooses in its own discretion to provide at each price point. And that information may become obsolete as soon as immediately after purchase, as the situation changes. Even if a passenger purchasing a reservation through a travel agent puts a brief “hold” on a seat with the intent of purchasing it within a few hours, the airline will guarantee the availability of the seat the seat but the price may change while the “hold” is pending. In the airline industry, “Here today, gone tomorrow” is a long view. The result of this carnival of price changes is that two passengers seated next to each other on the same flight may have paid prices for their tickets that vary by a factor of two, three or more, in part due to lack of adequate shopping information.

The airlines clearly benefit from such revenue management, but customers are confused and those who do not make their purchases at optimal times are discriminated against. These constant fare changes effectively remove critical price information that would help consumers to assess the value of particular ticket sale offers. This defeats consumer comparison shopping.

Problems Addressed by S. 383

S. 383 would address three categories of problems: (1) the consumer need for better, more relevant, information with which to shop for airlines tickets; (2) ticket use restrictions that serve to enhance opportunistic pricing by major airlines; and (3) service problems, including flight delays, flight diversions and baggage delivery delays.

NEED FOR MORE SHOPPING INFORMATION

Provide the “Electronic” Consumer With Access to All Fare Information. S.383 would require carriers to *“provide a consumer full access to all fares for that air carrier, regardless of the technology the consumer uses to access the fares if such information is requested by that consumer”*⁶. With one change, this provision could be extremely helpful to consumers who use the Internet for ticket purchasing. Last month, Consumers Union received a communication from a senior citizen who states that he tries to purchase his air tickets through the internet because of the additional costs the airlines recently have impose on travel agent and carrier telephone sales. But, he complains, the carriers he can use do not post their senior citizen discounts on the Internet. The bill before you would put an end to this practice by requiring the carrier to make all of its fares available, if you would strike the phrase “if such information is requested by that consumer.” This change is necessary; if the carrier chooses not to post the discount on the Internet, there is no way for the consumer to request and

⁶ Section 3, subparagraph (b)(4).

receive the information through the Internet medium in time to make the intended purchase. We recommend this change in the bill.

Providing Telephone and Ticketing Location Consumers With Usable Fare Information. It is not clear how Subparagraph (b)(4) could apply to consumers who purchase tickets by telephone or directly from carrier ticketing agents. Provision of the information as described in that Subparagraph would not be feasible to deliver by telephone. Walk-up customers would be placed before a computer terminal and left to search for the relevant information. Many consumers cannot do this.

The consumer needs fare information specific to the route, times of travel and class of service that he or she is considering in connection with a particular planned trip. It is important for the information requirements of S. 383 to take into account the fact that most consumers purchase round trip or multiple leg tickets, and the price available depends, among other factors, on the time of travel in each direction. Take, for instance, a consumer considering a trip from Washington to St. Louis on a Tuesday with a return two days later, on Thursday. The carrier will not sell that consumer that round trip ticket for the same price as it will sell another consumer a Washington to St. Louis round trip ticket on the same flights with a Tuesday departure and a Monday return. That is because the carrier's business sense tells it that the Tuesday-Thursday consumer is taking a necessary trip but the consumer with the weekend stayover is not – it can probably charge the shorter-tip consumer more. On an individual trip basis this may not be true, but on a cumulative basis, the carrier will have judged correctly far more often than not⁷. For the carrier to play these odds is simply a matter of opportunistic pricing.

That consumer's knowledge that there are lower fares available for passengers who stay over a weekend does not help if that consumer must return on Thursday. The information needed to shop as intelligently as is possible in this opportunistic pricing situation is (a) the lowest fare at which the carrier will sell a ticket to that consumer at that time, and (b) how this fare compares with the carrier's fares over the recent past. Ideally, the prospective passenger could also have the time to compare the carrier's price offer with that of other carriers *before the offered price changes*.

What, are the optimal elements that will provide consumers with the opportunity to shop for airfares, based on useful information? There are three elements:

- (a) Knowledge that the fare they are offered is the lowest fare the carrier will offer them at that time;

⁷ There are factors other than days of travel affecting the fares available to a given passenger, including how far in advance of the travel date the ticket is purchased, whether the flight is fully-booked close to departure time, and the seasonal popularity of the route involved.

- (b) The key pricing signals needed to judge whether the offered fare is high, low or average in the carrier's own scheme of fare-bargaining; and
- (c) That there is some time in which to compare the price offer with those of other carriers (if available).

The revisions we suggest of subparagraph (b)(4), coupled with the provisions of subparagraph (b)(7) as discussed below, would help to assure consumers that these three elements are present in the market place. However, we believe that an additional provision supplementary to subparagraph (b)(4) is needed to fully achieve this goal. We call this provision "Truth In Airfares".

Truth in Airfares Disclosures. On June 16, 1997, Consumers Union petitioned the Secretary of Transportation to require that carriers disclose to all consumers who inquire about ticket purchases for a particular route and class of service the average and lowest fares at which they sold such tickets for the period most recently reflected in the Computer Reservations Systems data base utilized by that carrier⁸. We asked the Secretary to commence a rulemaking to establish a "Truth in Airfares" order than would implement such a disclosure requirement. To date the Secretary has neither granted nor denied the Petition. It is our understanding that the Department is interested in some kind of disclosure rule, but is uncertain as to exactly what information a rule should require to be disclosed and as to how it can base the requirement on information more up-to-date than the current Carrier Reservation Systems data.

A mandate in S.383 to the Secretary to establish a Truth in Airfares consumer information disclosure rule, coupled with a statutory mandate to assure that the price quoted to the inquiring prospective customer is the lowest price available to that customer at that time would certainly help airline customers to make the best of the opportunistic pricing situation.

The Proposed Forty-Eight Hour Rule. S. 383 proposes to give each ticket purchaser forty-eight hours from purchase to obtain a full refund of his or her ticket price⁹. This provision is absolutely key to any information-based consumer shopping for reasonable airfares. With this rule in place, the price information would more greatly facilitate comparison of the carrier's price with those of other carriers (assuming there are other carriers on the route in question). That is because nonrefundable ticketing coupled with constant changes in ticket prices undercuts incentives for a consumer to shop for a better price. Any price a consumer does not immediately accept may not be there when that consumer calls back. And if the consumer accepts

⁸ Docket OST-97-2622. A copy of the *Consumer Reports* article is provided for the record.

⁹ Section 3, subparagraph (b)(7).

the offered price, the nonrefundable nature of the ticket makes further price comparison useless. One might even speculate that one reason the opportunistic-pricing carriers sell nonrefundable tickets is to consumers from comparison shopping¹⁰. Of course, it is crucial to this right that consumers be informed of it. S. 383 should include a disclosure provision.

Overbooking Information. The bill has a further provision that, while useful to some consumers as written, could be revised to add to an information-based consumer shopping system. S. 383 would require a carrier to “inform a ticketed passenger, upon request, whether the flight on which the passenger has a ticket is overbooked”¹¹. Coupled with the requirement to permit full-price refunds within forty-eight hours of ticket sales, this would be of some use to ticketed passengers. However, we believe that this provision should be expanded. When a flight is overbooked at the time of sale, the carrier should be required to inform the prospective passenger prior to completing the ticketing transaction. Some degree of overbooking is justified by passenger multiple bookings and no shows. But, surely, a consumer should have the right to know prior to purchase if he or she is about to purchase a ticket on an already overbooked flight. The consumer can then exercise such options as accepting the ticket and risking being involuntarily bumped, taking an earlier or later flight on the same airline or booking an available seat with another carrier. This right should extend to Internet purchasers as well as telephone and walk-up consumers.

Carriers may have the right to overbook, but they should not have the right to keep this knowledge from passengers. We recommend that this provision of the bill be revised to protect prospective as well as ticketed passengers.

Frequent Flyer Program Comparability Information. Finally, S.383 would require each carrier to provide passengers with information about the comparative value of frequent flyer programs among airlines¹². We support this concept. Although the most economical thing for a frequent flyer to do is to purchase the cheapest flight for each trip (unless differences are minimal) without regard to frequent flyer mileage, many frequent flyers make decisions based on the accumulation of frequent flyer miles. However, unless they fly very frequently, unless they have a choice of carriers and unless they belong to several clubs, they may have no accurate way of assessing which carrier among the choices available to them offers the best program.

The formula provided by Subparagraph 8 would seem to provide consumers with

¹⁰ The most important reason is undoubtedly to discourage the consumer from trading in a ticket even of the same carrier's subsequent lower price. The bill will not permit the consumer to do this indefinitely or repeatedly. A forty-eight hour rule seems to be a fair provision for both a competitive carrier and a price-conscious consumer. The bill needs a technical revision to address purchases made less than forty-eight hours before flight departure.

¹¹ Section 3, subparagraph (b)(1).

¹² Section 3, subparagraph (b)(8).

more information than they could process. What we believe a consumer needs, in order to compare the effectiveness of competing carriers' frequent flyer programs, is a periodically issued index that offers an at-a-glance overall judgment of the programs. We would suggest that this could be as simple as a ratio comparing the number of redemptions per reporting period to the number of passenger miles flown on the ten or twenty routes most popular with frequent flyer credit redeemers. This index could be included in the DOT consumer reports, along with on time and lost baggage performance. We recommend this revision of Subparagraph 8.

To summarize our recommendations on the "shopping information" provisions of S. 383:

- (1) Add a requirement that each airline offer a consumer who seeks to purchase a ticket for a particular route, time of travel and class of service with the lowest-priced ticket available at the time of the ticketing transaction;
- (2) Adopt a requirement that each carrier to provide *Internet* consumers with access to all of its available fares (including discount fares) without special request, by deleting the "request" requirement of Subparagraph (b)(4);
- (3) Add a Truth in Airfares program by requiring the Secretary of Transportation to issue a rule providing that each carrier must provide each prospective ticket-purchaser, including telephone and ticketing location customers, with information (such as average and lowest fare for route and class of service based on recent historical information) that will enhance consumer price-based shopping;
- (4) Adopt the 48-hour right of refund rule proposed in Subparagraph (b)(7), adding a consumer notification requirement and a technical revision to address purchases made less than forty-eight hours prior to flight departure ;
- (5) Adopt an overbooking information rule that requires each airline to inform a ticketed passenger upon request if the ticketed flight is overbooked, as provided in Subparagraph (b)(1);
- (6) Add an overbooking information rule that affirmatively requires each airline to inform a prospective customer, without a specific request, if they are being sold a ticket on an already overbooked flight;

- (7) Add a disclosure program that provides consumers with a simple item of information (such as a ratio) to compare the value of competing frequent flyer programs and require the Secretary to include this information in the Department's consumer report.

TICKET USE RESTRICTIONS. S. 383 would outlaw the traditional opportunistic pricing carrier tariff that prohibits so-called "double booking." This is the "two loaves of bread" practice I referred to earlier in which two round trips can be cheaper than one if the two involve weekend stays and the one does not. In response to our 1997 petition to the Secretary of Transportation, one of the major airlines defended what Consumers Union calls opportunistic pricing (and what the airlines call a "virtual real-time ticket auction") by saying that each passenger pays the value he places on that trip. But the tariff against double booking demonstrates that this assertion is absolutely untrue¹³. The carriers have created fare structures that invite consumers to find clever ways to get around. And when consumers find them, the carriers "outlaw" them by tariff.

The result of this rule may well be that some bargain fares will go up. But it will also mean that many other ticket prices for the same travel will go down. We believe that the overall results will be lower fares for most consumers. Consumers should not be placed in the position of having to "beat the system" in order to utilize the most economical ticket the carrier is willing to offer. Consumers Union very strongly supports this proposal.

SERVICE PROBLEMS.

Flight delays, cancellations and diversions. S. 383 would require that each carrier give its ticketed passengers reasonable notice when a scheduled flight will be delayed for any reason other than national security reasons¹⁴. It would also require carriers to inform passengers accurately and fully of the reason for the delay, cancellation or diversion of a flight¹⁵.

We are aware, although we cannot quantify them, of incidences in which flights are delayed without reasonable notice of the delay and then cancelled, depriving ticketed passengers of the opportunity to make timely alternative travel arrangements. We are also aware that, in at least some instances, the reasons for the delay and eventual cancellation is economic. The cancelled flight may have a low passenger

¹³ There is another, similar situation known as the "hidden city" fare. It may be cheaper for a consumer to purchase a ticket to a destination beyond that to which he or she wishes to travel, if the flight stops at the desired destination. The consumer can simply disembark the plane at the intermediate stop and not utilize the right to continue travel to the ticketed destination.

¹⁴ Section 3, subparagraph (b)(5).

¹⁵ Section 3, subparagraph (b)(6).

load; delay in announcing a cancellation may give the carrier some additional time to determine whether there will be enough last minute walk-up passengers will justify the costs of the flight. On other occasions, we believe, flights may be cancelled or diverted in order to re-allocate equipment to more economically profitable flights where mechanical problems or weather causes equipment shortages in other locations.

These decisions may benefit the carrier, but they clearly are to the traveler's detriment. Failure to notify ticketed consumers promptly prevents them from attempting to make timely alternative arrangements. And failure to notify them truthfully is an attempt by the carrier to retain customer loyalty by concealing true reasons for their performance. This prevents frequent flyers from making accurate assessments about their preferences among carriers. Therefore, we strongly support these proposed requirements.

We would suggest that, in addition to notifying passengers in these circumstances, carriers should be required to keep records of such instances and that the Department of Transportation should include some performance evaluation of them in its period consumer reports. The evaluation should include information on delays, on cancellations and on diversions and quantify the various reasons for performance problems in each category.

Baggage Delays. S. 383 would require carriers to deliver a passenger's baggage (if checked on the same flight on which the passenger traveled) within 24 hours of flight arrival, unless a longer delay is reasonable. The Department of Transportation consumer reports on lost luggage performance appear to have contributed to improved carrier performance in this respect. However, we can see no reason for delays of more than twenty-four hours in delivery of lost luggage, absent extenuating circumstances. We support this provision.

CONCLUSION

In conclusion, Mr. Chairman and Members of the Committee, Consumers Union is pleased to support S.383 and urges you to move it forward. We believe that our suggestions for changes and additions to the bill are important and will strengthen some of its key provisions and urge you to adopt them. The primary effects of such a bill would be to give consumers needed tools with which to shop for tickets in a service industry dominated by opportunistic pricing practices – and, hopefully, to reduce some of the incentives for those anti-consumer pricing and service practices.